No. 83768-6

CHAMBERS, J. (dissenting) —

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Oliver Wendell Holmes, The Common Law 5 (Mark DeWolfe Howe ed., 1967) (1881). The court today makes an exacting, logically defensible, minute examination of the Washington State Medical Use of Marijuana Act, chapter 69.51A RCW, and concludes that our law, like conventional medicine, affords Jane Roe no relief. But the approach it takes would have forestalled significant developments in the law. *See, e.g., Gardner v. Loomis Armored, Inc.,* 128 Wn.2d 931, 913 P.2d 377 (1996). Because I conclude that a jury should hear Roe's claim for wrongful discharge in violation of public policy, I respectfully dissent.

I stress a few of the salient facts. The people of our state enacted the medical marijuana act by initiative because they concluded that "humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion." Laws of 1999, ch.

2, § 2 (Initiative Measure 692, approved Nov. 3, 1998) (codified as RCW 69.51A.005). It says plainly that "[a]ny person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter *and shall not be penalized in any manner, or denied any right or privilege*, for such actions." *Id.* § 5 (emphasis added) (codified as RCW 69.51A.040(1)).

Roe seems to be exactly the sort of person the people intended to protect. She suffered from debilitating migraine headaches that resisted treatment. A doctor advised her that the potential benefits of marijuana likely outweighed the health risks. Her migraines subsided enough that she could seek and find a job.

The tort of wrongful discharge in violation of public policy exists to protect Washington workers in such straits. "(1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element)," (2) "that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element)," "(3) that the public-policy-linked conduct caused the dismissal (the causation element)," and "(4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)." *Gardner*, 128 Wn.2d at 941 (citing Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities §§ 3.7, 3.14, 3.19, 3.21 (1991)); *see also Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008).

In my view, the first element is easily satisfied. The public policy is clear and is stated on the first page of the act. "The people find that humanitarian compassion

necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion." RCW 69.51A.005; *see also* RCW 69.51A.040(1) ("Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions."). This court has also recognized this clear policy. "As a compassionate gesture, the people of this state, by initiative, allowed patients afflicted with medical conditions that might be eased by marijuana to use it under limited circumstances." *State v. Fry,* 168 Wn.2d 1, 14, 228 P.3d 1 (2010) (Chambers, J., concurring); *accord Fry,* 168 Wn.2d at 20 (Sanders, J., dissenting). True, the act's operative sections focus on creating an affirmative defense. But this language is broad and we undermine the people's will by treating it as merely decorative. Even the limitations in the act support finding a policy in favor of allowing medical marijuana in situations like this one. The initiative said that "[n]othing in this chapter requires any accommodation of any medical use of marijuana in any placement of employment, in any school bus or on any school grounds, or in any youth center." Laws of 1999, ch. 2, § 8(4) (Initiative Measure 692, approved Nov. 3, 1998). Since then, the legislature has clarified that last provision to say that "[n]othing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place of employment," clearly indicating a legislative intent that off-site use does require accommodation. RCW

69.51A.060(4) (emphasis added).

To satisfy the jeopardy element, Roe must show that "'discouraging the conduct in which [she] engaged would jeopardize the public policy'" and "'*directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy.'" *Danny*, 165 Wn.2d at 222 (quoting *Gardner,* 128 Wn.2d at 941, 945). She has met this burden. Allowing someone to be fired from their job for using the treatment allowed by law when sanctioned by a doctor jeopardizes the clear policy of the act. It will discourage other people in her position from availing themselves of a treatment the voters decided should be available.

The third element is undisputed: Roe's protected conduct caused her employer to fire her.

The fourth is best left to a jury. While I am unpersuaded that federal law prohibits Teletech Customer Case Management (Colorado) LLC from following Washington law on this subject, the employer may well have an overriding reason not to permit an employee to medicate with marijuana. Based on the record and briefing before us, I would leave that question to a jury.

Neither I nor the law would require employers to employ drug impaired workers. The law is intended to treat marijuana like any other medication. It is well established that employers must "reasonably accommodate a disabled employee unless the accommodation would be an undue hardship on the employer." *Riehl v. Foodmaker, Inc*., 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (citing *Pulcino v. Fed. Express Corp*., 141 Wn.2d 629, 639, 9 P.3d 787 (2000)). Quite often, marijuana is

used to treat conditions that would qualify as a disability. *Compare* RCW 69.51A.010 (listing some of the qualifying conditions), *with* RCW 49.60.040(7)(a) (defining "disability" for purposes of the Washington Law Against Discrimination, chapter 49.60 RCW). As I read the law, an employer is only required to *reasonably* accommodate the disability through accepting the treatment to the extent such accommodation does not impose an undue hardship. *Reihl,* 152 Wn.2d at 145.

Unfortunately, Teletech has a drug screening policy that prohibits employees from having any evidence of medical marijuana in the employee's system without regard for whether the medical marijuana was consumed "on site," whether the medical marijuana affects the employee's job performance, or whether the employer can reasonably accommodate the employee's medical use. This case, along with many others, shows that the act is in need of legislative review. *E.g. State v. Tracy,* 158 Wn.2d 683, 147 P.3d 559 (2006). To that end, I urge the legislature to thoughtfully review and improve the act.

I respectfully dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR: